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No. 03-332

Supreme Court, U.S.
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In The Supreme Court of the United States

JOSEPH DODGE, et al.,

Petitioners,

v.

COTTER CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS BRIEF FOR THE STATES OF NEW MEXICO, OKLAHOMA AND WYOMING IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMICI CURIAE

The States of New Mexico, Oklahoma and Wyoming by their Attorneys General, Patricia A. Madrid, New Mexico, W. A. Drew Edmondson, Oklahoma and Patrick Crank, Wyoming, respectfully submit their brief as amici curiae through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The Amici States address the standard of review to be applied in determining whether a district court satisfied its gatekeeper function under *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1999).

STATEMENT OF INTEREST OF AMICI CURIAE

The Attorneys General of the States of New Mexico, Oklahoma and Wyoming are charged with the duty and responsibility of enforcing the laws and protecting the legal interests of the citizens of their respective states. As the chief legal enforcement officers of their states, each Attorney General must carefully calculate and husband the resources available to prosecute properly civil and criminal actions.

The decision of the Tenth Circuit panel in *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003) opens the door for a state's adversaries to demand carte blanche procedures tantamount to a mini-trial on the admissibility of expert witness testimony. If left unchecked, the Tenth Circuit opinion will work an unfair and prejudicial hardship on governmental agencies responsible for enforcing the law and will make litigating complex cases prohibitively expensive.

By engaging in a hybrid de novo review of *Daubert* procedures, the Tenth and Seventh Circuits have departed from the standard established by this Court regarding the role to be performed by district courts in controlling the presentation of expert witness testimony at trial. This Court needs to resolve the conflict that now exists between the circuits on the standard by which a trial judge's conduct as gatekeeper under *Daubert* will be reviewed on appeal. The Amici States respectfully request that the Court grant the Petition for Writ of Certiorari to review a question that is of utmost importance to the administration of justice in all the states.

SUMMARY OF ARGUMENT

The Tenth Circuit decision in *Dodge* and the Seventh Circuit's opinions in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002) and *U.S. v. Allen*, 269 F.3d 842 (7th Cir. 2001) conflict with the other reporting circuits, which apply a straightforward abuse of discretion review.[1]

[1] *See e.g.*, *U.S. v. Lopez-Lopez*, 282 F.3d 1, 14 (1st Cir. 2002); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 15 (1st Cir. 2000); *Campbell ex rel. Campbell v. Metropolitan Prop. & Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir. 2000); *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 n.3 (3d Cir. 2002); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 153-54 (3d Cir. 2000); *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003); *U.S. v. Rubio*, 321 F.3d 517, 525 (5th Cir. 2003); *Clay v. Ford Motor Co.*, 215 F.3d 663, 666-67 (6th Cir. 2000); *Kudabeck v. Kroger Co.*, ___ F.3d ___, 2003 WL 21781920 at *3-*6 (8th Cir. 2001 Aug. 4, 2003); *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928-29 (8th Cir. 2001); *U.S. v. Hankey*, 203 F.3d 1160, 1167-69 (9th Cir. 2000); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000); *U.S. v. Williams*, 212 F.3d 1305, 1308 (D.C. Cir. 2000).

Moreover, this Court in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), held that specific forms of hearings and live witness testimony are not necessary to satisfy the district court's gatekeeper role under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The Tenth and Seventh Circuit's new construction of the requirements of *Daubert* and the reversal de novo of the trial court's process of conducting a pretrial *Daubert* hearing and making detailed *Daubert* findings will work a substantial hardship on governmental entities in their roles as enforcers of federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA or Superfund), and other laws designed to protect the public interest.

ARGUMENT

I. The Tenth Circuit Improperly Applied De Novo Review to "How" the District Court Performed its Gatekeeper Task under *Daubert*

On its face, the Tenth Circuit opinion in *Dodge* applies a "de novo" standard to not just *whether* the district court performed the gatekeeper function, but *how* it did so, in apparent contradiction to this Court's authority under *Daubert* and its progeny. The Tenth Circuit opinion will impact the method that governments charged with enforcement of environmental and other laws prosecute such cases, and fails to give adequate guidance to federal district courts on proper handling of the very important *Daubert* expert issues in such cases.

The Tenth Circuit asserts:

> Even had the district court performed its gatekeeper function, on this record we would be inclined to conclude that the court abused its discretion by unreasonably limiting the evidence upon which to base the decision
>
> . . . .
>
> Concluding that the [defendant's *Daubert*] motion [in limine] violated local court rules regarding length, the district court returned the motion and accompanying [several thousand page] appendix and allowed Cotter to file a revised motion and appendix, neither of which could exceed 20 pages in length. . . . At the [pretrial] *Daubert* hearing . . . citing Cotter's failure to notify the court of this intention . . . the court refused to allow any live witness testimony. [The district Court] insisted on the exclusive use of argument and proffers at the *Daubert* hearing . . . [which] lasted just over four hours . . . [and thereafter conducted an] in camera voir dire of each expert at trial [before ruling on admissibility]. . . .

Dodge, 328 F.3d at 1223, 1224, 1228.

The Tenth Circuit does not provide any guidance on what procedures will be acceptable in the future for the district courts and prosecutors to successfully comply with the Tenth Circuit's *Daubert* requirements, under an abuse of discretion review. The *Dodge* opinion can be read to *require* even more extensive hearings pretrial with unlimited live witnesses and without proscribed limits on the size of briefs and other materials filed with the court. *Dodge* could be used to justify virtually unchecked *Daubert* hearings pretrial, on pain of reversal for abuse of

discretion. This opinion is, consequently, of very serious concern for law enforcement officials in both the criminal and civil areas.

As this Court has directed, the trial judge is to make the decision on the admissibility of expert testimony, and not the court of appeals. *General Elec. Co. v. Joiner*, 522 U.S. 136, 138 (1997). The question of admission of expert testimony is an *evidence* issue, and under the framework set out in *Daubert*, and as expanded upon by more recent Supreme Court decisions, the trial court is in the best position to hear and evaluate the evidence and determine whether expert testimony is reliable, relevant, and thus admissible under Fed. R. Evid. 702. The appellate court is not to undertake a second detailed examination of the evidence, devise new and different methods for evaluating the expert evidence, or reverse the district court in order to achieve a different result. *Joiner,* 522 U.S. at 138-139; *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999). It is not to evaluate de novo "*how*" the district court performed its *Daubert* role, but it is only to review de novo "*whether*" the district court performed any *Daubert* analysis. *Goebel v. Denver & Rio Grande Western R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

The court below acknowledges that the district court held a pretrial *Daubert* hearing, reviewed briefs, declarations and heard argument on the experts that were challenged. The trial judge further allowed defendant live cross-examination and voir dire in camera, before ruling on admissibility and allowing the experts to give their opinions. *Dodge*, 328 F.3d at 1224-1228. The court below recites that the trial court did acknowledge that she was mindful of the *Daubert* requirement and the Tenth Circuit's directions to make detailed findings, and made on

the record findings as to the admissibility of each expert. *Dodge*, 328 F.3d at 1227.

Thus, based on the face of the opinion, the *Dodge* trial judge did perform gatekeeper functions regarding the reliability and methodology of the challenged experts.

Kumho Tire holds that a separate *Daubert* hearing is not required.

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. . . . Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. *Kumho Tire*, 526 U.S. at 152-53; *see also United States v. Alatorre*, 222 F.3d 1098, 1102-1104 (9th Cir. 2000) (holding no separate *Daubert* hearing required), *cited in Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002).

II. Disturbing Effect on Law Enforcement Efforts

Ultimately, the Tenth Circuit, by its own statement of the standard, necessarily had to find that the enumerated efforts by the district court over years of case management in a complex environmental case involving a declared Super Fund site were "arbitrary, capricious, whimsical or manifestly unreasonable [constituted] a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge*, 328 F.3d at 1223.

As a practical matter, the Opinion will hinder enforcement of environmental laws, such as CERCLA, the Price Anderson Act (42 U.S.C. § 2011 et seq.), criminal prosecutions, securities fraud, antitrust, and other cases where expert testimony is crucial. The Tenth Circuit's proposed standard and lack of guidance on limits to required *Daubert* procedures demanded by defendants will significantly increase the strain on judicial resources, requiring, as it seems, some sort of mandatory trial before trial. Such a standard will impose a significant detrimental impact on governmental agencies responsible for enforcing the laws on behalf of all citizens, and make prosecuting cases prohibitively expensive. Moreover, mass tort and environmental contamination cases to be brought by state entities will not be viable if the normal judicial processes are ignored and these cases are singled out for protracted procedures without limits.

Granting the Petition for Writ of Certiorari will allow this Court to resolve the conflict over the standard of review that now exists between the circuits and to assess the chilling ramifications of the *Dodge* opinion on the government's pursuit of both civil and criminal enforcement matters that depend in large measure upon the presentation of expert witness testimony for their successful prosecution.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Dated: October 6, 2003

Respectfully submitted,

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